**BEFORE THE APPEALS BOARD**
**FOR THE**
**KANSAS DIVISION OF WORKERS COMPENSATION**

| | | |
|---|---|---|
| **MATTHEW F. KENNEDY**<br>Claimant | ) | |
| VS. | ) | Docket No. **1,041,314** |
| **CITY OF WICHITA**<br>Self-Insured Respondent | ) | |

## ORDER

Self-insured respondent requested review of the February 12, 2010 Award by Administrative Law Judge Nelsonna Potts Barnes. The Board heard oral argument on May 21, 2010.

### APPEARANCES

Steven R. Wilson of Wichita, Kansas, appeared for the claimant. Edward D. Heath Jr. of Wichita, Kansas, appeared for the self-insured respondent.

### RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. At oral argument to the Board, the parties agreed claimant suffered a 10 percent whole person functional impairment and respondent has paid the compensation for that impairment. The parties further agreed that if claimant is entitled to compensation for a work disability, the Administrative Law Judge's (ALJ) Award should be affirmed.

### ISSUES

The ALJ found claimant sustained a 33.5 percent work disability (45 percent wage loss and 22 percent task loss) from the date of accident through May 31, 2009, and then effective June 1, 2009, a work disability of 42.5 percent (63 percent wage loss and 22 percent task loss).

Respondent requests review of the nature and extent of claimant's disability. Respondent argues claimant is only entitled to his functional impairment because after his surgery he was released without restrictions and returned to his regular duties but after a dispute with his supervisor claimant voluntarily terminated his employment with respondent.

Claimant argues that he did receive permanent physical restrictions as a result of his work-related injury. Accordingly, he is entitled to a work disability upon loss of his job for any reason. Claimant requests the Board to affirm the ALJ's Award.

The sole issue raised on review is whether claimant is entitled to compensation for a work disability or limited to compensation for his functional impairment.

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

The facts are undisputed. Briefly stated, claimant suffered a work-related injury that ultimately led to a November 5, 2008, surgical microdiskectomy on his back at L5-S1. Claimant was released by the treating physician to return to full-duty work without restrictions in April 2009. Claimant had returned to his pre-injury job, but after a dispute with his supervisor claimant voluntarily terminated his employment with respondent on May 1, 2009. Although the treating physician released claimant without permanent restrictions, the claimant's medical expert did impose permanent restrictions on May 4, 2009.

Respondent argues claimant is not entitled to a work disability under the facts of this case because the treating physician had released claimant from medical treatment and did not impose any restrictions. Claimant had returned to his pre-injury employment at a comparable wage. But then, after a dispute with his supervisor claimant voluntarily terminated his employment. Under those facts respondent argues claimant did not suffer either a wage or task loss and his compensation should be limited to his functional impairment.

The respondent's argument overlooks the fact that the only physician whose testimony is in the evidentiary record is Dr. George Fluter and he opined claimant should be permanently restricted to occasionally lifting, carrying, pushing, and pulling up to 50 pounds or 20 pounds frequently. The doctor further restricted claimant to occasional bending, twisting and stooping. The Board adopts Dr. Fluter's restrictions and finds that as a result of his work-related accident the claimant was provided permanent physical restrictions. And as a result of those restrictions claimant did suffer a task loss.

As previously noted, the parties stipulated that as a result of the work-related accident claimant suffers a 10 percent whole person functional impairment. Because claimant's back injury is not compensated under the schedule in K.S.A. 44-510d, claimant's permanent disability benefits are governed by K.S.A. 44-510e(a), which provides in part:

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment.

In *Bergstrom*,[1] the Kansas Supreme Court interpreted K.S.A. 44-510e and ruled that it was not proper to impute a post-injury wage when calculating the wage loss in the statute's permanent partial general disability formula. The Kansas Supreme Court stated, in pertinent part:

> When a workers compensation statute is plain and unambiguous, the courts must give effect to its express language rather than determine what the law should or should not be. The court will not speculate on legislative intent and will not read the statute to add something not readily found in it. If the statutory language is clear, there is no need to resort to statutory construction.[2]
>
> K.S.A. 44-510e(a) contains no requirement that an injured worker make a good-faith effort to seek postinjury employment to mitigate the employer's liability. *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995), *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 320, 944 P.2d 179 (1997), and all subsequent cases that have imposed a good-faith effort requirement on injured workers are disapproved.[3]
>
> We can find nothing in the language of K.S.A. 44-510e(a) that requires an injured worker to make a good-faith effort to seek out and accept alternate employment. The legislature expressly directed a physician to look to the tasks that the employee performed during the 15-year period preceding the accident and reach an opinion of the percentage that can still be performed. That percentage is averaged together with the difference between the wages the worker was earning at the time of the injury and the wages the worker was earning after the injury. The legislature then placed a limitation on permanent partial general disability compensation when the employee "*is engaging* in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury." (Emphasis added.) K.S.A. 44-510e(a). The legislature did not state that the employee is required to *attempt to work* or that the employee *is*

---

[1] *Bergstrom v. Spears Manufacturing Co.*, 289 Kan. 605, 214 P.3d 676 (2009).

[2] *Id.*, Syl. ¶ 1.

[3] *Id.*, Syl. ¶ 3.

> *capable of engaging in work* for wages equal to 90% or more of the preinjury average gross weekly wage.[4]

Before *Bergstrom*, the circumstances surrounding claimant's termination would have been an issue for the Board to consider in determining whether claimant's actual post-injury wages should be used in computing his permanent partial general disability under K.S.A. 44-510e. But *Bergstrom* makes clear that good faith is not an element of the permanent partial general disability formula and those earlier Kansas Court of Appeals cases that treated good faith as an element of the formula are no longer valid.

Accordingly, when determining the wage loss component of K.S.A. 44-510e(a), the Board need only consider claimant's actual post-injury wages earned. If claimant is engaged in *any work* for wages equal to 90 percent or more of the wage earned at the time of the injury, then no work disability is owed. But if claimant is *not* earning such wages, then work disability is to be considered based upon the formula set forth in the statute. The entitlement to work disability is conditioned upon the wage loss and the statute makes no reference to the reasons for that wage loss.[5] What is crucial is whether the injured employee's condition warrants restrictions which, in light of a wage loss, puts him or her at a disadvantage in the open labor market.[6] In this case, claimant has permanent restrictions which would place him at a disadvantage in the open labor market.

Respondent argues that *Bergstrom* should not apply because the facts are distinguishable as claimant voluntarily terminated his employment. The Board disagrees. For the Board to make that distinction it would be creating an exception to using actual wage loss, which K.S.A. 44-510e requires. *Bergstrom* provides that it is improper to apply exceptions to the work disability formula as the statute is clear and unambiguous. Consequently, the Board concludes claimant's actual post-injury earnings should be used in computing his permanent partial general disability. The Board concludes claimant is entitled to compensation for a work disability and consequently, as agreed by the parties, the ALJ's Award is affirmed.

## AWARD

**WHEREFORE**, it is the decision of the Board that the Award of Administrative Law Judge Nelsonna Potts Barnes dated February 12, 2010, is affirmed.

**IT IS SO ORDERED.**

---

[4] *Id.*, at 609-610.

[5] *Tyler v. Goodyear Tire and Rubber Co.*, No. 102236 (Feb. 26, 2010).

[6] *Roskilly v. Boeing Co.*, 34 Kan. App. 2d 196, 116 P.3d 38 (2005).

Dated this _____ day of June 2010.

_____
BOARD MEMBER

_____
BOARD MEMBER

_____
BOARD MEMBER

c: Steven R. Wilson, Attorney for Claimant
Edward D. Heath Jr., Attorney for Self-Insured Respondent
Nelsonna Potts Barnes, Administrative Law Judge